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The False Claims Act: Review and Outlook

By Scott F. Roybal and Jennifer N. Le*

In this article, the authors first briefly review the basic elements of the False Claims Act (FCA) and its qui tam provisions, and recent Department of Justice (DOJ) enforcement statistics. They then discuss a number of FCA developments, including: (1) the aftermath and impact of the Supreme Court decisions in United States ex rel. Polansky v. Executive Health Resources, Inc.,[1] and United States ex rel. Schutte v. SuperValu, Inc.;[2] *(2) the Supreme Court's expansion of FCA liability to claims made to private-public funded programs in* Wisconsin Bell, Inc. v. United States ex rel. Heath;[3] *(3) the Trump administration's FCA goals, strategies, and approaches; (4) legislative changes to existing FCA laws; and (5) continuing FCA enforcement focus and scrutiny on the opioid crisis, COVID-19 pandemic-related fraud, and cybersecurity measures.*

I. BASIC ELEMENTS OF THE FCA AND QUI TAM PROVISIONS

The Civil False Claims Act (FCA)[4] was enacted in 1863 in response to allegations of fraud in Civil War procurements. The FCA has since become the government's weapon of choice to combat fraud, waste, and abuse in government contracting. The FCA makes it unlawful for a person to knowingly: (1) present or cause to be presented to the government a false or fraudulent claim for payment, or (2) make or use a false record or statement that is material to a claim for payment.[5] A person acts "knowingly" under the FCA if he or she acts with "actual knowledge, deliberate ignorance or reckless

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[1] United States ex rel. Polansky v. Executive Health Resources, Inc., 599 U.S. 419 (2023).

[2] United States ex rel. Schutte v. SuperValu, Inc., 598 U.S. 739 (2023).

[3] Wisconsin Bell, Inc. v. United States ex rel. Heath, No. 23-1127 (U.S. Feb. 21, 2025).

[4] 31 U.S.C. § 3729 et seq.

[5] 31 U.S.C. §§ 3729(a)(1)(A)–(B) (2009); U.S. ex rel. Rose v. Stephens Inst., 909 F.3d 1012, 1017 (9th Cir. 2018).

disregard of the truth or falsity of information."[6] Mistakes and ordinary negligence, however, are not actionable under the FCA.[7]

The FCA provides for up to treble damages and as of January 15, 2025, penalties of between $14,308 and $28,619 per violation. Violators are also subject to administrative sanctions, including potential suspension, debarment, or program exclusion from participating in government contracts. The FCA has a lengthy statute of limitations of no less than six years and, in some cases, up to 10 years after a violation has been committed.

The FCA permits private citizens, known as qui tam relators, to bring cases on behalf of the government. In qui tam cases, the complaint and a written disclosure of all relevant evidence known to the relator must be served on the U.S. Attorney for the judicial district of the court where the case was filed as well as on the U.S. Attorney General. The qui tam complaint is then ordered sealed for a period of at least 60 days, and the government is required to investigate the allegations contained therein and decide whether to intervene. If the government declines to intervene, the relator may proceed with the complaint on behalf of the government. The complaint must be kept confidential and is not served on the defendant until the seal is lifted. Relators may receive a "whistleblower bounty" of between 15 and 25 percent of the recovery if the government intervenes in their cases and between 25 and 30 percent if the government declines.

II. DOJ REPORTS MORE THAN 1,400 NEW FCA CASES AND BILLIONS OF DOLLARS IN RECOVERIES

Figure 1 charts new FCA cases per year, which shows a steady increase in qui tam-driven cases.[8] Well over 700 FCA cases have been filed each year for the past 15 years and a high percent of those cases have been qui tam cases. Many qui tam cases remain under seal for years pending the DOJ's intervention decision. In 2024, there was a high-water mark in new FCA cases brought by both the government and qui tam relators for a total of 1,402, with the highest number of new qui tam actions, 979, both likely linked to the expenditure of substantial federal funds related to pandemic relief and the ever increasing budgets tied to federal healthcare and other procurement programs. This uptick started back in 2020 during the beginning of the COVID-19 pandemic and

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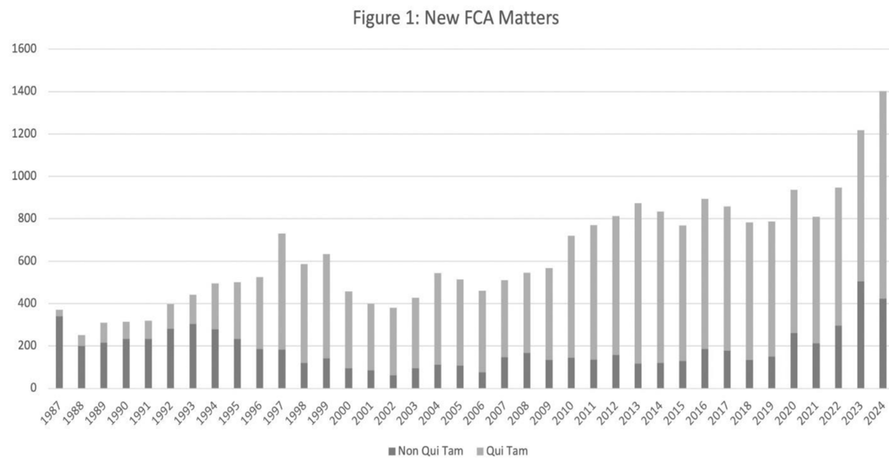
[6] 31 U.S.C. § 3729(b).

[7] United States v. Sci. Applications Int'l Corp., 626 F.3d 1257 653 F. Supp. 2d 87 (D.D.C. 2009).

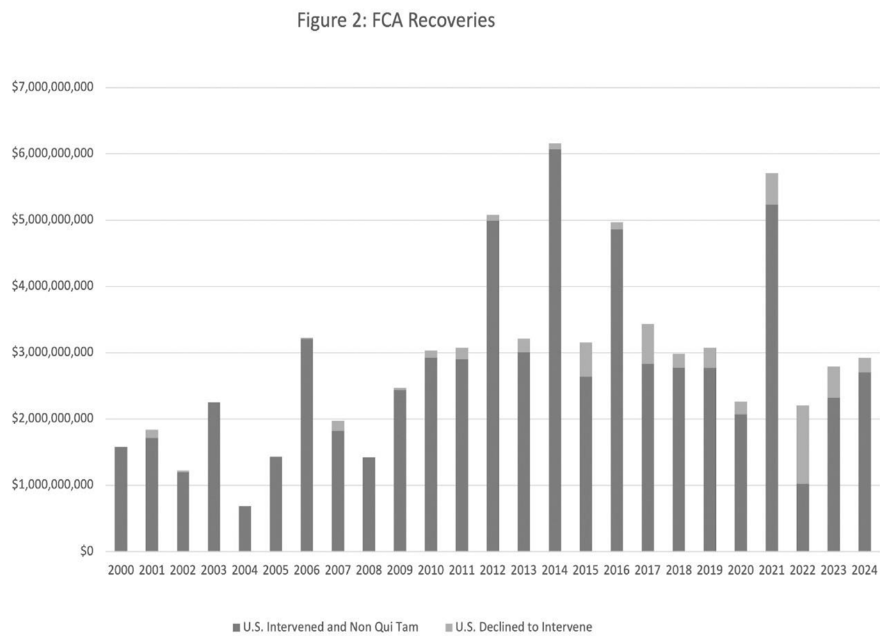
[8] DOJ Office of Public Affairs, Fraud Statistics—Overview (January 15, 2025), available at https://www.justice.gov/archives/opa/media/1384546/dl.

related federal stimulus. In the past four years, the government also filed more new FCA cases per year than in prior years, showing the FCA remains a high priority for enforcement.



The DOJ collected over $2.9 billion in settlements and judgments in 2024, a slight increase from 2023 FCA monetary recoveries of $2.68 billion, but still trending downwards from prior years when there were more individual big settlements. Nonetheless, in 2024, DOJ pulled in 558 settlements and judgments, the second highest number in a single year after last year's record of 566. Figure 2 shows annual recoveries by the government in FCA cases and compares recoveries coming from qui tam cases where the government declined to intervene versus non-qui tam cases or qui tam cases where the government intervened.[9] Consistent with recent trends, DOJ reported recoveries ($1.67 billion) in 2024 mostly came from settlements and judgments from the healthcare industry, including managed care providers, hospitals, pharmacies, pharmaceutical companies, laboratories, long-term acute care facilities, and physicians. DOJ reported that additional 2024 recoveries reflected its focused attention on new enforcement priorities such as pandemic-related fraud and cybersecurity requirements in government contracts and grants.

[9] Id.



III. THE AFTERMATH OF THE SUPREME COURT DECISIONS IN *POLANSKY* AND *SCHUTTE*

A. The Government Exercising Its Broad Dismissal Authority Under 31 U.S.C. § 3730(c)(2)(A)

FCA Section 3730(c)(2)(A)[10] allows the government to dismiss a qui tam action over the objection of the relator. Rarely used until recent years, § 3730(c)(2)(A), significantly backed by the Supreme Court's decision in *United States ex rel. Polansky v. Executive Health Resources, Inc.,*[11] has now emerged as a more frequent method of ending qui tam FCA cases. In *Polansky*, the Supreme Court (in an 8-1 majority decision) affirmed the government's authority to dismiss qui tam actions whenever it chose to intervene during the litigation, whether at the outset or a later time in the case. The Supreme Court also held that in assessing such a dismissal motion, district courts should apply the rule generally governing voluntary dismissal of suits in ordinary civil litigation, Rule 41(a). Though district courts must evaluate whether the

[10] "The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion."

[11] United States ex rel. Polansky v. Executive Health Resources, Inc., 599 U.S. 419 (2023).

dismissal occurred on "proper" terms, which requires weighing the relator's interests against the government's interests, the Supreme Court expressly recognized that the government will satisfy Rule 41 "in all but the most exceptional cases" and that deference should be given to the government's views (once it has intervened). To meet the standard for Rule 41, the government need only offer a reasonable argument for why the burdens of continued litigation outweigh its benefits (e.g., grounds for why the case is not likely to prevail and arguments related to significant litigation and discovery costs). This is so even if the relator presents compelling counterarguments.

In the wake of *Polansky*, the government has secured several dismissals in the FCA context, facing little to no resistance from the courts in implementing its broad dismissal authority under § 3730(c)(2)(A).[12] This slew of recent decisions illustrates the government's dismissal muscle, allowing it to intervene and seek dismissal with confidence at any stage of a qui tam litigation, fully aware that the courts accept that the threshold for doing so is low.

Moreover, while *Polansky* confirmed that a § 3730(c)(2)(A) motion affords a qui tam relator an "opportunity for hearing," courts have nonetheless granted dismissals based solely on the parties' written submissions, without holding a separate hearing.[13] In *Vanderlan*, the district court emphasized that *Polansky* only required the government to offer a reasonable argument for why the burdens of continued litigation outweigh its benefits, with the term "argument" not mandating discovery or an evidentiary hearing. Moreover, the *Vanderlan* court concluded that the requirement for a relator to have an "opportunity to be heard" could be satisfied through briefing, submitted exhibits and/or oral arguments. In August 2024, the Fourth Circuit cemented this interpretation when in *U.S. ex rel. Doe v. Credit Suisse AG*[14] it held that § 3730(c)(2)(A) does not require any in-person "hearing." The majority opinion provided three reasons for its holding:

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[12] See e.g., U.S. ex rel. USN4U v. Wolf Creek Federal Services, No. 1:17-cv-0558 (N.D. Ohio Dec. 7, 2023); U.S. ex. rel. Sargent v. McDonough, No. 1-23-cv-00328-LEW (D. Me. Feb. 27, 2024); U.S. ex rel. Vanderlan v. Jackson HMA, LLC, No. 3:15-CV-767-DPJ-FKB (S.D. Miss. Apr. 12, 2024); U.S. ex rel. Hill v. Ernst & Young U.S., LLP, No. 1:23-CV-319 (E.D. Va. Mar. 4, 2024); U.S. ex rel. Guglielmo v. Leidos, Inc., No. 1:19-CV-1576 (D.D.C. Feb. 20, 2024), and U.S. ex rel. Relator LLC v. Dayhoff, No. 0:23-cv-60292-KMW (S.D. Fla. Apr. 30, 2024).

[13] See e.g., U.S. ex rel. Vanderlan v. Jackson HMA, LLC, No. 3:15-CV-767-DPJ-FKB (S.D. Miss. April 12, 2024) (dismissal granted without any discovery or evidentiary hearing); and U.S. ex rel. USN4U v. Wolf Creek Federal Services, No. 1:17-cv-0558 (N.D. Ohio Dec. 7, 2023) (dismissal granted without any hearing).

[14] U.S. ex rel. Doe v. Credit Suisse AG, 117 F.4th 155, 162 (4th Cir. 2024).

(1) The Second Circuit and several district courts have determined written submissions met the hearing requirement;

(2) The Fourth Circuit and other courts have found the term "hearing" has a "fluid" meaning not limited to live proceedings; and

(3) *Polansky* confirmed that the government is entitled to substantial deference in its decision to dismiss an action.

Thus far, no relator has successfully demonstrated, in a published opinion, that their case is "exceptional" enough to overcome a government's § 3730(c)(2)(A) motion to dismiss. And, it is clear that the government is increasingly willing to pursue such dismissal if and when it chooses, including after years of costly litigation and discovery expenses borne by the relators. This growing trend may have some chilling effect on suits brought by relators. In light of the DOJ's string of published wins in this area, relators and their counsel should seriously assess the likelihood of a case's success as they gather evidence and be prepared to demonstrate the case's potential to prevail without overburdening the government to prevent a dismissal.

B. Recent Litigation Reviving the Decades-Old Question on the Constitutionality of Qui Tam Suits

FCA qui tam provisions going back decades have historically withstood constitutionality attacks by defendants. However, *Polansky* may have revitalized this defense, reopening the possibility for defendants and lower courts to reconsider these issues. Readers may recall that in his dissenting opinion, Justice Clarence Thomas noted that qui tam actions may violate the Appointments Clause in Article II of the U.S. Constitution. According to Justice Thomas, the right to represent the interests of the United States in litigation belongs to the executive branch and only appointed officers of the United States may carry out such function. FCA whistleblowers and their counsel are not appointed officers of the United States, thus, "Congress cannot authorize [] private relator[s] to wield executive authority to represent the government's interests in civil litigation." In a concurrence, Justice Brett Kavanaugh joined by Justice Amy Coney Barrett, agreed with Justice Thomas' constitutional concerns regarding the viability of qui tam actions under Article II. Justice Kavanagh suggested that the Court consider those concerns "in an appropriate case."

Spurred by the three Justices' stance, courts have seen increasing litigation regarding the constitutionality of FCA qui tam actions. For the most part, every district court faced with the issue has upheld the qui tam provisions' constitutionality. And, the DOJ under the Trump administration has followed suit with Attorney General Pam Bondi assuring Senator Chuck Grassley during her January 15, 2025 confirmation hearing that she would uphold and defend the FCA in its entirety, including its qui tam provisions.

Nevertheless, in late September 2024, for the first time ever, one district court in the Middle District of Florida broke from the precedential pack and declared the qui tam provisions unconstitutional. In *United States ex rel. Zafirov v. Fla. Med. Assocs. LLC, et al.*,[15] U.S. District Court Judge Kathryn Kimball Mizelle dismissed a case after five years of litigation finding (as Justice Thomas did) that the qui tam provisions indeed violated the Appointments Clause in Article II of the U.S. Constitution because relators attempt to act as officers of the United States despite not being properly appointed.

In reaching her holding, Judge Mizelle assessed whether relators are "officers" under a two-factor test: do they (1) "exercise significant authority pursuant to the laws of the United States," and (2) "occupy a continuing position established by law?" She concluded in the affirmative as to both factors, reasoning that relators in FCA matters (1) wield significant authority under federal law by initiating civil enforcement actions on behalf of the government to vindicate a public right, setting legal precedent, and recovering treble damages for the public, and (2) hold a "continuing position established by law" because "the office of relator exists whether a person is appointed to that office or not, making that office 'continuous and permanent.' "

Both the government and relator in *Zafirov* timely appealed the decision. It is uncertain if the Eleventh Circuit will uphold the decision cementing this novel break from decades-old precedence. During the pending decision of the Eleventh Circuit, FCA defendants and their counsel can be expected to piggyback off of the constitutionality arguments in *Zafirov* to oust qui tam actions in other lower district courts and circuits. And if a substantial circuit split arises, this constitutional question may very well find its way to the Supreme Court, as hoped by several of the Justices.

C. Early Dismissal and Summary Judgment Remain Elusive for FCA Defendants Grappling with Scienter

In June 2023, the Supreme Court issued a unanimous decision in *United States ex rel. Schutte v. SuperValu, Inc.*,[16] settling disputes related to the FCA's scienter element (i.e., defendant's state of mind), which only allows liability when the alleged wrongdoer is shown to have acted "knowingly."[17] Specifically,

[15] United States ex rel. Zafirov v. Fla. Med. Assocs. LLC, et al., No. 8:19-cv-01236-KKM-SPF (M.D. Fla. Sept. 30, 2024).

[16] United States ex rel. Schutte v. SuperValu, Inc., 598 U.S. 739 (2023).

[17] The FCA defines knowingly as a person acting with actual knowledge or deliberate

the Court held that liability under the FCA hinges on the defendant's subjective belief as to whether a claim was false at the time it submitted the claim and not what an objectively reasonable person may have known or believed. The key inquiry here is "whether the defendant knew the claim was false. Thus if [defendants] correctly interpreted the relevant phrase and believed their claims were false, then they should have known their claims were false."

The FCA's scienter element typically has been an issue determined at the summary judgment or trial stage of litigation when the factual record is fully developed. Following *Schutte*, lower court decisions confirmed the difficulty of obtaining early dismissal based on scienter because defendants cannot rely on the argument that some "reasonable person" might have interpreted a vague and ambiguous regulation in a different manner than the defendants to negate any finding of scienter. This was illustrated in *United States ex rel. Ocean State Transit, LLC v. Infante-Green*,[18] where the court, applying *Schutte*, reopened the case after dismissal (pursuant Federal Rule of Civil Procedure 59(e)), finding that scienter was sufficiently plead where plaintiff merely alleged that the defendant certified compliance with the CARES Act requirement knowing that he would not comply. The district court specifically noted that in the early pleading stage, the court must accept as true the well-pleaded facts.

Similarly, defendants faced increasing difficulty securing a summary judgment based on scienter, following *Schutte*, especially because *Schutte* itself vacated a grant of summary of judgment. Defendants also cannot rely on *Schutte* to advance any arguments to establish that there was no subjective belief of wrongdoing simply because they received government communications seemingly approving the alleged conduct at issue. This is exactly what occurred in *Scollick ex rel. United States v. Narula*,[19] and the district court nonetheless expressed skepticism and found that based on all the evidence presented, "there was a triable issue of fact regarding whether defendants' had actual knowledge of the fraud they were allegedly committing, and accordingly held that the issue would need to proceed to trial."

Though defendants face an uphill battle in obtaining victory before trial based on attacking the specific element of scienter, one thing is certain, defendants still have the ability to present at trial a good faith defense to prevail on scienter—that is demonstrating that they cannot be held liable because they

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ignorance or reckless disregard of the truth or falsity of information. A showing of specific intent is not required.

[18] United States ex rel. Ocean State Transit, LLC v. Infante-Green, No. 1:21-CV-00391-MSMPAS (D.R.I. Sept. 22, 2023).

[19] Scollick ex rel. United States v. Narula, No. 1:14-CV-01339-RCL (D.D.C. May 7, 2024).

believed they were operating in good faith compliance with the law at the time of their claim submissions. And, especially where ambiguous regulations exist that are material to defendants' claims to the government, defendants should carefully document their attempts to figure out such regulations' correct meaning and document what they believe are the correct meanings of the regulations at the time of claim submission. This process may be shored up by defendants seeking real-time or contemporaneous legal advice regarding a reasonable interpretation and recommended course of conduct. If, at a later time, defendant's course of conduct is challenged in an FCA action, it may be able to avoid a finding of scienter (i.e., knowing misconduct) by showing it engaged in reasonable conduct and relied on the advice of counsel. Of course, this may potentially trigger issues of waiving attorney-client privilege and protected work product to establish the defense based on good-faith and reasoned subjective belief.

IV. SUPREME COURT AFFIRMS REIMBURSEMENTS FROM FCC'S E-RATE PROGRAMS ARE SUBJECT TO THE FCA

On February 21, 2025, the Supreme Court delivered a unanimous opinion in *Wisconsin Bell, Inc. v. United States ex rel. Heath*,[20] holding that telecommunications companies participating in the federal Education-Rate (E-Rate) program, which is administered by the Federal Communications Commission (FCC) to support school and library connectivity, can be sued for excess payouts under the FCA because the E-Rate funds are provided, in part, through the U.S. Treasury. Under this holding a "claim" under the FCA can encompass any reimbursement requests from a privately administered fund if it is partially funded by the government.

By way of background, the E-Rate program was established by the Telecommunications Act of 1996 to subsidize internet and telecommunications services for schools and libraries. To finance this program's fund, telecommunications carriers must pay into it. A private company, Universal Service Administrative Company (USAC), manages it by collecting and distributing the money in the fund pursuant to certain FCC regulations. Such regulations include the "lowest corresponding price" rule, which prohibits carriers from charging schools and libraries more than they would charge a "similarly situated" customer. After a price is set, a school or library has two options: pay the full price upfront and seek reimbursement from the fund; or pay a discounted price, allowing the carrier to seek the reimbursement.

Relator Todd Heath brought suit alleging Wisconsin Bell, Inc. charged schools at rates higher than those offered to "similarly situated" customers, thus,

[20] Wisconsin Bell, Inc. v. United States ex rel. Heath, No. 23-1127 (U.S. Feb. 21, 2025).

violating the "lowest corresponding rule" and in turn the FCA. Wisconsin Bell moved to dismiss, arguing that the requests for reimbursement under the E-Rate program were not "claims" within the meaning of the FCA because (1) the money in the fund was derived from private carriers' contributions, not the government, and (2) the money was administered by USAC, a private company, not the government. The district court denied the motion to dismiss, and the Seventh Circuit affirmed.

Writing for the Supreme Court's unanimous opinion, Justice Elena Kagan affirmed the lower courts' rulings and found that E-Rate reimbursement requests indeed qualify as FCA "claims" because the government provided a "portion of the money" to the E-Rate program fund during the relevant period. Specifically, $100 million came from the U.S. Treasury, thus making any reimbursement request a request for government funds.

Ostensibly the Supreme Court expanded FCA liability by defining FCA "claims" to include any reimbursement or payment requests from public-private programs, notwithstanding that the government's funding contribution may be relatively minimal. Companies participating in such programs must stay especially vigilant for potential FCA violations, especially if the government has any role in collecting, administering, managing, or distributing any portion of the funds.

Additionally, the Supreme Court left two substantial issues for the lower courts to resolve: (1) whether any damages, if the plaintiff prevails under similar circumstances, should be capped at the amount of money the government provided, and (2) whether the ruling applies to programs where the government was merely a "passthrough" for the funds. As such, companies facing FCA issues related to claims involving public-private programs should be prepared to compile evidence and devise legal arguments addressing these key issues.

V. THE TRUMP ADMINISTRATION VOWS AGGRESSIVE ENFORCEMENT IN THE FCA CONTEXT BUT RESTORES PROHIBITION ON USE OF IMPROPER REGULATORY GUIDANCE DOCUMENTS

On February 25, 2025, Deputy Assistant Attorney General Michael Granston of the Department of Justice (DOJ) Commercial Litigation Branch delivered a speech at the Federal Bar Association's annual qui tam conference, confirming the new administration's commitment to aggressive enforcement of FCA. In particular, Granston emphasized that this robust approach is consistent with the Trump administration's priorities of "achieving government efficiency and rooting out waste, fraud, and abuse." Granston underscored the DOJ's FCA enforcement efforts will reach beyond the DOJ's typical targets, focusing on customs fraud and illegal trade practices. Granston's statements add to previous remarks from other Trump administration officials, who have identified illegal diversity, equity, an inclusion (DEI), pandemic relief, domestic sourcing/industry, and other excessive cost-related considerations as important enforcement priorities. On May 12, 2025, the DOJ Criminal Division issued the DOJ's top ten enforcement priorities, further confirming the Trump administration's focus on weeding out healthcare fraud, federal program and procurement fraud, financial fraud, and customs fraud. Companies across various sectors, including healthcare, government contracting, federal grants, and industries involving cybersecurity, import/export, and freight forwarding should be prepared to ramp up their compliance efforts.

Granston also highlighted the success of FCA enforcement in the healthcare space, noting that between 2021 to 2023, such investigations resulted in nearly threefold recoupment of the actual costs of investigating such fraud. He also noted that FCA enforcement remains a powerful general deterrent, citing the fact the government deters an additional $10 of fraud for every $1 it recovers. In sum, Granston's speech affirms that there will be no slowing down on the FCA enforcement front.

On a more modest note regarding enforcement, earlier in February 2025, recently confirmed Attorney General Pam Bondi issued a memorandum to the DOJ, reinstating the previous Trump administration's ban on using agency guidance documents as a basis for pursuing violations of the FCA. Specifically, the Bondi Memo states that guidance documents "violate the law when they are issued without undergoing the rulemaking process established by law yet purport to have a direct effect on the rights and obligations of private parties governed by the agency." Bondi aims to restore the DOJ to lawful use of regulatory authority and advance the DOJs "compliance with its mission and duty to uphold the law" through this prohibition and express rescission of the Garland Memo issued on July 1, 2021 (which permitted use of such guidance). Consequently, for FCA actions, the DOJ (or proxy relators) will not be able to rely on agency guidance materials only going forward to establish violations of law or false statements.

Notwithstanding, nothing in the Bondi Memo addresses whether the DOJ can still use guidance documents to help establish scienter of the defendant. Historically, and in the first Trump administration, this practice was permitted, especially to prove scienter when there was evidence that a party read certain guidance documents and thus had knowledge of certain government regulatory interpretations. Further clarity on this issue may be forthcoming when the Associate Attorney General is expected to issue a report "concerning strategies and measures that can be utilized to eliminate the illegal or improper use of guidance documents."

VI. TRUMP ADMINISTRATION SEEKS TO END "ILLEGAL" DEI PROGRAMS BY LEVERAGING THE FCA

On January 21, 2025, President Trump issued an executive order entitled, "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" (EO). The EO aims to shut down affirmative action and illegal DEI initiatives, policies and programs within the federal government and among its contractors. The EO also revokes the longstanding EO 11246, Equal Employment Opportunity (issued in September 1965), which required government contractors to comply with equal employment and affirmative action mandates to do business with the federal government.

Although this area is in a constant state of flux and subject to pending litigation, the Trump administration had hoped government contractors and grant recipients would have until April 21, 2025 to comply with the EO. Key provisions of the EO impacting such entities include:

- Prohibiting federal contractors from considering "race color, sex, sexual preference, religion, or national origin in ways that violate the Nation's civil rights laws" in their employment practices;
- Requiring federal contractors to (1) "agree that [their] compliance in all respects with all applicable Federal anti-discrimination laws is material to the government's payment decisions for purposes of [the FCA]" and (2) "certify that [they do] not operate any programs promoting DEI that violate applicable Federal anti-discrimination laws";
- Requiring that all federal contracts eliminate any references to and requirements of DEI policies and programs in the federal acquisition, contracting, grant and financial assistance procedures; and
- Instructing the Attorney General to provide a report by May 21, 2025 proposing an enforcement plan that addresses "the most egregious and discriminatory DEI practitioners in each sector of concern" and "specific steps or measures to deter DEI programs or principles . . . that constitute illegal discrimination or preferences."

The EO is clear: the Trump administration fully intends on utilizing the FCA to enforce its anti-DEI policies. Certainly, the EO creates new avenues for industrious whistleblowers and relators to pursue legal actions against entities they believe to be violating the EO's mandates. Exactly how the courts will handle these impending cases is still up in the air, and legal challenges to the EO most certainly will delay its broad implementation. Indeed, on February 21, 2025, a federal district court in Maryland recently issued a temporary restraining order blocking the enforcement of the EO.[21] The court held that the EO violates the First and Fifth Amendments of the Constitution because it impermissibly targets expressions and views in favor of DEI and is antithetical to the federal anti-discrimination laws themselves. The Trump administration appealed, and on March 14, 2025, the Fourth Circuit issued a stay, temporarily lifting the preliminary restraining order and allowed the EO to be enforced while the appeal is pending. Nevertheless, while the courts grapple with the viability of the EO, entities doing work with the government or receiving grants from the government will need to consider how and whether to heed the EO's provisions and revisit their employment practices and policies to ensure they're in alignment with the EO amidst an uncertain legal landscape. Such entities may consider reviewing any (current and future) regulatory guidance related to the EO that may help shed light on how to determine what constitutes impermissible DEI programs.

VII. LEGISLATIVE MOVEMENT ON THE FCA FRONT—BABY FALSE CLAIMS ACT REVAMPED

Senator Chuck Grassley,[22] a long-time ardent advocate of the FCA on Capitol Hill, has spent years pushing bills to bolster its enforcement. While his False Claims Amendments Act of 2023 has seen little traction since its referral to the Senate Committee on the Judiciary, Senator Grassley has successfully pushed through his Administrative False Claims Act (AFCA) which President Biden signed into law on December 23, 2024 as part of the Servicemember Quality of Life Improvement and National Defense Authorization Act (NDAA) for Fiscal Year 2025. The AFCA renames and revitalizes the Program Fraud Civil Remedies Act of 1986 (PFCRA a/k/a as the Baby False Claims Act) with revisions that will give this underutilized enforcement mechanism more teeth in combating fraud and recouping funds from false claims.

Enacted more than 40 years ago, the PFCRA allowed agencies to pursue in administrative proceedings false claims and statements that the DOJ opted to not prosecute. The PFCRA applies to false claims of $150,000 or less and imposes double damages and penalties of up to $13,946 for each claim. The PFCRA's main purpose was to resolve small-dollar fraud cases that the DOJ did not have the litigation resources to pursue. The Act contained no qui tam provisions. Initially, the executive branch agencies used the PFCRA, but over

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[21] National Association of Diversity Officers in Higher Education, et al. v. Donald J. Trump, et al., Case No. 1:25-Cv-00333-ABA (D. Md. 2025).

[22] Senator Grassley is responsible for key amendments strengthening the FCA enforcement in 1986 and 2010.

time, the Act went largely unused as many agencies found the associated complicated administrative process had substantial diminishing returns.

Addressing a number of the PFCRA's shortcomings, the AFCA: (1) increases the amount for claims from $150,000 to $1 million, to be adjusted for inflation; (2) permits agencies to recoup costs associated with investigating and prosecuting such cases; (3) expands the pool of officials, including members of the Board of Contract Appeals, to hear and review such cases; (4) extends the statute of limitations for the AFCA to six years from the violation or three years after the material facts are known, but no more than ten years after the violation; and (5) expands the definition of false claims to include those made to avoid or decrease an obligation to pay or transmit property, services, or money to the government (i.e., a reverse false claim). Yet despite these substantial amendments, the AFCA still has no qui tam provisions.

The passage of the AFCA signals increase agency scrutiny for all federal government contractors and grantees, with the AFCA intended to reach claims not typically handled under the FCA. Crucially, unlike the FCA, the AFCA covers false statements even in the absence of any claim. Moreover, agency Inspectors General are charged with enforcing the AFCA as well as receiving contractor's mandatory and voluntary disclosures, making it easier for agencies to scrutinize and pursue cases against contractors based upon such disclosures (or lack thereof). Accordingly, federal contractors and grantees should vigilantly monitor their compliance, take great care in their disclosures, and negotiate releases of any related AFCA claims as part of their FCA settlement agreements with the government.

Notwithstanding what appears to be increased enforcement, entities doing business with the government could leverage the AFCA to facilitate settlements directly with the agencies for claims within the AFCA monetary range. And, because unlike the FCA, the AFCA provides for only double damages, agencies may consider settling claims for substantially less than the double damages multiplier.

VIII. DOJ MAINTAINS ITS FOCUS ON COMBATTING THE OPIOID CRISIS THROUGH FCA ENFORCEMENT

Healthcare fraud remains the predominant source of FCA settlements and judgments, with the DOJ diligently pursuing these cases to protect patients from medically unnecessary and harmful practices, among other alleged abuses. The DOJ particularly focuses on healthcare providers, pharmaceutical companies and pharmacies that contribute to and exacerbate the opioid crisis to the public's detriment.

Notably, 2024 saw major FCA settlements involving excessive distributions and unlawful prescriptions of opioids, including two settlements totaling close to $900 million. In February 2024, Endo Health Solutions Inc. (EHSI), currently undergoing bankruptcy proceedings, agreed to a settlement allowing the United States an unsubordinated, general unsecured claim of $475.6 million. This resolution settled FCA claims related to alleged losses to federal healthcare programs that paid for EHSI's Opana ER, an opioid drug sold and marketed by EHSI. In its enforcement action against EHSI, the DOJ alleged that the company engaged in an aggressive marketing scheme targeting high-volume opioid prescribers, many of whom were known to overprescribe Opana ER and other opioids for non-medically accepted indications.

In July 2024, the DOJ secured a $7.5 million payout and an allowed, unsubordinated, general unsecured claim of $401.8 million against Rite-Aid Corporation (and its ten subsidiaries and affiliates) in the company's bankruptcy case. This settlement resolved FCA claims predicated on allegations that Rite-Aid knowingly dispensed unlawful prescriptions for controlled substances and highly dangerous/addictive opioids (e.g., oxycodone and fentanyl) that lacked legitimate medical purpose, were invalid prescriptions, and were not for medically-accepted indications.

Finally, in August 2024, the DOJ obtained a consent judgment against Dr. Gregory Gerber, requiring him to pay $4.7 million for violations of the FCA and the Controlled Substances Act. In a civil complaint filed in August 2018, the DOJ alleged that Dr. Gerber unlawfully issued prescriptions without a legitimate medical basis for opioids and other controlled substances, one patient tragically died from an overdose of fentanyl patches prescribed by Dr. Gerber, and he received kickback payments from a manufacturer as part of a scheme to unlawfully prescribe Subsys, a dangerous fentanyl-containing opioid, in violation of the FCA.

IX. ONGOING PRIORITY FCA ENFORCEMENT AGAINST PANDEMIC RELIEF FRAUD

For the past number of years, practitioners in the white collar and FCA areas have predicted the impending flood of government and whistleblower prosecution as a result of the COVID-19 pandemic, the CARES Act, and other pandemic relief responses from the federal government. Trillions of dollars were spent by the federal government in pandemic relief, often rushed with opaque qualifications for receipt. Numerous enforcement bodies were created to address anticipated pandemic relief fraud, including the Special Inspector General for Pandemic Recovery, Congressional oversight committees, and various, multi-jurisdictional task forces within the DOJ and related agencies. The DOJ initially brought a flurry of criminal charges against obvious pandemic fraudsters based on misrepresentations in relief applications, such as fraudulent Paycheck Protection Program (PPP) applications, and for misuse of funds.

Since March 2020, many enforcement actions have targeted the most obvious cases of fraud such as (1) PPP loans to non-existent businesses; (2) loan applicants that falsified the number of employees; and (3) loans that were used for unauthorized purchases such as expensive cars, properties, and vacations.

As anticipated, wrongful or deceitful applications for pandemic relief funds have also resulted in civil liability under the FCA. Though these cases make up the majority of the pandemic-related FCA cases, 2024 also saw an uptick in cases concerning alleged pandemic-fraud impacting Medicare and other federal healthcare programs for ancillary services related to COVID-19 testing and treatments. Pandemic-related FCA cases are also increasingly involving pandemic-relief programs other than the PPP, such as the Payroll Support Program for air carriers and the Restaurant Revitalization Fund. Overall, the DOJ reported that in 2024, it obtained more than 250 FCA settlements and judgments (exceeding more than $250 million) resolving claims of pandemic-related fraud. Federal government officials also reported that the record-setting number of whistle-blower FCA cases filed in 2024 was likely driven by pandemic-related fraud cases, with data miners playing a considerable role in contributing to this number.

Among the most notable cases involving pandemic-relief fraud stemmed from the enforcement action against Kabbage Inc., a PPP lender accused of knowingly submitting thousands of false claims for loan forgiveness, loan guarantees, and processing fees to the Small Business Administration (SBA). Kabbage allegedly received tens of millions of dollars through the PPP intended to help lend taxpayer funds to businesses in need. Rather than safeguarding those funds, Kabbage prioritized maximizing its profits by doling out inflated and fraudulent loans, causing the SBA to guarantee and forgive loans in amounts that exceeded what borrowers were eligible to receive. Kabbage subsequently sold its assets, leaving the company financially depleted and bankrupt and harming taxpayers who had to take a loss due to Kabbage's misconduct. Kabbage also failed to implement appropriate fraud controls to meet its PPP and Bank Secrecy Act/Anti-Money Laundering (BSA/AML) obligations. Ultimately, Kabbage agreed to resolve all allegations with the government receiving a total allowed, unsubordinated, general unsecured claim in Kabbage's bankruptcy proceeding of up to $120 million. The resolution also settled claims brought under two separate qui tam cases against Kabbage.

Beyond PPP fraud, the DOJ also raked in another $40.6 million from two separate healthcare companies and their respective owners based upon false claims related to medically unnecessary panel tests during the pandemic. Andrew Maloney and his clinical laboratory, Capstone Diagnostics, agreed to pay $14.3 million to resolve alleged submissions of false claims to government healthcare programs. Maloney and Capstone purportedly sought profit by paying volume-based commissions to sales representatives to promote respiratory pathogen panel (RPP) tests to senior communities interested only in COVID-19 tests, using forged physician signatures that did not reflect the medical conditions of recipients. Similarly, the DOJ obtained a $26.3 million default judgment against Patrick Britton Harr and his company, Provista Health LLC, for allegedly billing Medicare for unnecessary RPP tests during the peak of the COVID-19 pandemic.

In light of these developments, recipients and lenders of PPP loans and other pandemic relief funds, as well as healthcare companies billing for COVID-19 treatments, should heed the lessons from these settlements. If they have not already done so, PPP participants should conduct diligent reviews of their application and lending processes, ensuring fund usage aligns with required terms and conditions, and rectify any misrepresentations or false certifications to mitigate potential future enforcement actions. Healthcare companies administering COVID-19 treatments should meticulously monitor and review billing practices, establishing best practices to detect and prevent improper billing and the occurrence of medically unnecessary tests.

X. CONTINUED SUBSTANTIAL FCA SCRUTINY OF REQUIRED CYBERSECURITY MEASURES

In October 2021, the DOJ launched its Civil Cyber-Fraud Initiative, sparking expectations for increased enforcement actions and qui tam cases under the FCA related to cybersecurity issues. While the initiative was seemingly slow in 2022, the past two years witnessed a surge in activity, which included substantial settlements and enforcement actions as well as regulatory development hinting at future enforcement risks for all companies doing work with the government.

In August 2024, the DOJ announced its FCA suit against Georgia Institute of Technology (Georgia Tech) and Georgia Tech Research Corp. (GTRC) based upon claims that the defendants failed to meet cybersecurity requirements in connection with the Department of Defense (DoD) contracts. The DOJ joined a whistleblower action, initiated by current and former members of Georgia Tech's cybersecurity team. In the complaint, the DOJ specifically alleged that Astrolavos Lab (a research lab at Georgia Tech) failed to develop and implement a system security plan, as required by DoD cybersecurity regulations, and failed to install, update or run anti-virus or anti-malware tools on desktops, laptops, servers and networks at the lab. Additionally, the complaint alleged that in December 2020 Georgia Tech and GRTC submitted a false cybersecurity assessment score to DoD for the Georgia Tech campus. The DoD requires as a "condition of contract award" that the contractor defendants submit "summary level scores reflecting the status of their compliance with applicable cybersecurity requirements on covered contracting systems that are used to store or access covered defense information." The DOJ avers that the summary level score of 98 submitted by defendants was false for two reasons: (1) Georgia Tech did not have a campus-wide IT system, and (2) the score was for a fictitious environment and did not apply to any covered contracting system that could or would process, store, or transmit covered defense information.

In June 2024, the DOJ also reached resolutions with two companies, Guidehouse Inc. and Nan McKay and Associates, for over $11 million to resolve allegations that they failed to meet cybersecurity requirements in contracts intended to ensure a secure online environment for low-income New Yorkers to apply for federal rental assistance during the COVID-19 pandemic. Both companies acknowledged their failure to fulfill data integrity obligations, particularly their failure to complete necessary pre-production testing before launching the site that housed applicants' information. Within 12 hours of its launch, the site had to be shut down due to a security breach that compromised applicants' personal information, some of which became accessible on the Internet. The DOJ alleged that if the required cybersecurity testing had been conducted, the security breach might have been detected and prevented.

Lastly, late 2024 and early 2025 saw significant revisions to cybersecurity requirements for federal contractors with the changes aimed at strengthening protections for federal contract information (FCI) or controlled unclassified information (CUI) (i.e., DoD's CMMC Program[23] and FAR Council's Proposed Rule to Amend the FAR.[24] These rules will directly affect federal contractors by increasing FCA enforcement exposure, resulting in higher compliance costs to ensure proper processes to protect such information.

First, in October 2024, the DoD finalized a new rule[25] to implement its Cybersecurity Maturity Model Certification (CMMC Program), which sets forth baseline cybersecurity requirements for all defense contractors and subcontractors. The rule went into effect on December 16, 2024, requiring contractors and subcontracts seeking to partner with the DoD to establish proactive measures to protect FCI and CUI that contractors process, store, or transmit for the DoD. Specifically, the CMMC Program mandates contractors with FCI and CUI to implement cybersecurity measures at progressively

[23] 32 CFR Part 170.

[24] 48 CFR Parts 1–5, 7, 9, 11, 12, 15, 27, 33, 42, 52 and 53.

[25] This final rule can be accessed at https://www.federalregister.gov/documents/2024/10/15/2024-22905/cybersecurity-maturity-model-certification-cmmc-program.

advanced levels, tailored to the sensitivity of the information and the specific project. Each level necessitates an assessment to certify the contractor's security controls, which can be self-conducted or performed by a government-approved third party (i.e., C3PAO). While contractors are not required to meet all CMMC requirements at the time of award eligibility, those pursuing levels above Level 1 (Self-Assessment) must achieve at least 80% compliance and attain full compliance within 180 days of the contract award.

Following in the DoD's tracks, in January 15, 2025, the Federal Acquisition Regulation (FAR) Council proposed a rule[26] (with public comments expected by March 17, 2024) to amend the FAR, extending cybersecurity requirements to all federal government contractors and subcontractors handling CUI. This proposed rule largely mirrors the CMMC Program but seeks to broaden its application across all federal agencies. Key provisions of the proposed rule include:

(1) Requiring federal agencies to provide contractors a Standard Form identifying all the CUI entrusted to the contractors;

(2) Introducing a new FAR clause that will require contractors to implement National Institute of Standards and Technology Special Publication 800-171, Revision 2 to protect CUI, report cybersecurity incidents within 8 hours of discovery, and comply with any other requirements specified in the contracting agency's Standard Form; and

(3) Introducing a new FAR requiring contractors to report to the agencies if they received any information that could potentially be CUI or report cyber incidents related to such information.

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[26] The FAR Council's proposed rule can be accessed at https://www.federalregister.gov/documents/2025/01/15/2024-30437/federal-acquisition-regulation-controlled-unclassified-information.